IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LAVONDA S.,

Plaintiff,

v.

Civil Action No.
3:20-CV-0483 (DEP)

KILOLO KIJAKAZI, Acting Commissioner of Social Security,[1]

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACKMAN GORTON LAW FIRM
P.O. Box 89
1500 East Main St.
Endicott, NY 13761-0089

PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

DANIEL S. TARABELLI, ESQ.

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[1] Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. *See* 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(3)(c), are cross-motions for judgment on the pleadings.[2] Oral argument was heard in connection with those motions on August 25, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is

[2] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: August 31, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LAVONDA S.,

Plaintiff,

vs. 3:20-CV-483

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

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DECISION - August 25, 2021

the HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

For Plaintiff: LACHMAN, GORTON LAW FIRM
Attorneys at Law
1500 East Main Street
Endicott, NY 13761
BY: PETER A. GORTON, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
15 Sudbury Street
Boston, MA 02203
BY: DANIEL STICE TARABELLI, ESQ.

Eileen McDonough, RPR, CRR
Official United States Court Reporter
P.O. Box 7367
Syracuse, New York 13261
(315)234-8546

THE COURT: Let me begin my decision by thanking counsel for excellent presentations. I enjoyed working with both of you, and you always thoroughly address in your written and verbal submissions the issues.

I have before me a challenge to the decision of the Commissioner of Social Security pursuant to 42, United States Code, Sections 405(g) and 1383(c)(3). In that decision the Commissioner, or Acting Commissioner, found that plaintiff was not disabled at relevant times, and therefore ineligible for the benefits that she sought.

The background is as follows. Plaintiff was born in December of 1968. She is currently 52 years of age. She was 44 years old at the time of the alleged onset of her disability on May 30, 2013.

Plaintiff stands 5-foot 2-inches in height. She has weighed at various times between 209 and 259 pounds. In December of 2014 she underwent bariatric weight reduction surgery. Plaintiff lives in a house in Binghamton. It appears she currently lives alone, although she did at one time live with her husband.

Plaintiff has a GED and has attended Bible College, studying organizational leadership and Biblical studies. I am uncertain whether she graduated. By my calculation she may have graduated in 2019. She was in her third year, or sixth semester, in March of 2018. While there she took four

courses and was in school four days per week. Plaintiff drives. She is also a certified CNA.

In terms of work, plaintiff worked as a CNA, or a nurse assistant, in various settings from 1993 to July or August of 2013. She also worked in the area of child care, and as a private duty nurse in 2013, and as a part-time tax preparer from 2010 to 2013. While in college, she worked part time as a cashier in the college cafeteria from August or September 2017 forward. Plaintiff has returned to work as an overnight home health aide working approximately 16 to 32 hours per week, and as a call center representative working 37 and a half hours per week.

Plaintiff suffers from many physical impairments that have been diagnosed over time, including fibromyalgia, potential regional pain syndrome and arthritis, morbid obesity, borderline diabetes, diabetic peripheral neuropathy, a right shoulder issue stemming from a Workers' Compensation injury on or about May 30, 2013. MRI testing of the right shoulder revealed a tiny partial tear. She also suffers from bilateral knee issues, bilateral hand issues, a small disk protrusion at C5-C6 without neuro compression or stenosis. Plaintiff uses a cane, although it has not been prescribed by any medical provider. Mentally plaintiff suffers from major depressive disorder and post-traumatic stress disorder.

Plaintiff's primary care provider is family Nurse

Practitioner Trichelle -- she was Trichelle Kirchner. At some point she became Feheley. But I will refer to her for the sake of consistency as Nurse Practitioner Kirchner. She has seen Nurse Practitioner Kirchner since sometime in the 1990s. She has also seen Dr. Owais Ahmed from 2006 to 2011; rheumatologist Dr. Paul Dura from 2006 to 2016; orthopedic physician Dr. Eric Seybold from February until June of 2013; Dr. Shalini Bichala. She received some knee injections twice a year from Dr. Thomas VanGorder. She was at one point receiving counseling from licensed clinical social worker Esther McGurrin from Family and Childrens Society. She has had multiple emergency room visits. She has also seen Physician's Assistant Aspen D'Angelo who works with Dr. Dura.

Medications prescribed over time to the plaintiff include Gabapentin, Tizanidine, hydrocodone, Sinuprol, Cymbalta, Lyrica.

In terms of activities of daily living, plaintiff is able to shower and dress, she drives, cooks, does laundry, sweeps, mops, operates a computer, walks for exercise, she does some socialization, watches television, reads. She is a former smoker and marijuana user and an occasional alcohol user.

Procedurally, plaintiff applied for Title II benefits under the Act on June 10, 2013, and Title XVI supplemental security income benefits on November 15, 2013,

both alleging an onset date of May 30, 2013. Administrative Law Judge Marie Greener conducted a hearing to address those applications on April 27, 2015, and subsequently issued a decision on June 5, 2015, which was unfavorable to the plaintiff.

The Social Security Administration Appeals Council denied review of that decision on October 13, 2016. The matter was remanded pursuant to an order issued by me on June 12, 2017. That was followed by an Appeals Council order of remand on August 15, 2017. A hearing was conducted on March 14, 2018, by Administrative Law Judge Elizabeth Koennecke, who subsequently issued an unfavorable decision on April 26, 2018. The matter was subsequently remanded on stipulation by order issued by Magistrate Judge Therese Wiley Dancks on February 28, 2019. The Appeals Council subsequently issued an order remanding on May 15, 2019 with instructions.

A second hearing was conducted by Administrative Law Judge Koennecke on February 4, 2020. She ultimately issued an unfavorable decision on February 13, 2020. This action was subsequently commenced on April 29, 2020, and is timely.

In her decision, ALJ Koennecke applied the familiar five-step sequential test for determining disability. She first noted that the plaintiff was -- the focus was on a

closed period between the alleged onset date of May 30, 2013, and May 31, 2018, based upon her return to work. She noted plaintiff was insured through December 31, 2018.

She then found at step one the plaintiff had not engaged in substantial gainful activity during the relevant period. She did note some earnings and those were considered.

At step two, ALJ Koennecke concluded that plaintiff suffers from severe impairments that provide more than minimal limitations on her ability to perform basic work functions, including fibromyalgia, herniated nucleus pulposus of the cervical spine without compression, right shoulder tendonitis, and diabetic peripheral neuropathy. She noted parenthetically that those were the same impairments that she found severe in her earlier decision, and the Appeals Council found no error at step two in its earlier decision.

At step three, ALJ Koennecke concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the Commissioner's regulations, specifically considering listings 1.04 and 11.14.

The Administrative Law Judge then concluded that on the evidence in the record that plaintiff retains the residual functional capacity, or RFC, to perform light work, except she can maintain a sitting or standing position for

about 45 minutes at one time before needing to assume a new position. Applying that RFC finding, she concluded at step four that plaintiff is incapable of performing her past relevant work and proceeded to step five.

At step five, ALJ Koennecke noted that if plaintiff were capable of performing a full range of light work, a finding of no disability would be compelled by the Medical-Vocational Guidelines set forth in the regulations, or so-called grids, and specifically Grid Rules 202.14 and 202.21.

With the assistance of testimony from a vocational expert, ALJ Koennecke next concluded that plaintiff is capable of performing available work in the national economy and cited representative positions as a work tickets distributor, a recreation aide, and a furniture rental consultant, which parenthetically she noted is also the same as a furniture sales consultant, and thus concluded the plaintiff was not disabled.

My function, as you know, is limited and the standard applied is extremely deferential. I must determine whether correct legal principles were applied and the resulting determination is supported by substantial evidence, which is defined as such relevant evidence as a reasonable mind would find sufficient to support a conclusion.

The Second Circuit has made it very clear,

including in *Brault versus Social Security Administration Commissioner*, 683 F.3d 443, from 2012, that the standard is exceedingly deferential, more so than the clearly erroneous standard that we as lawyers are familiar with. Under the standard, once an ALJ finds a fact, that fact can be rejected only if a reasonable factfinder would have to conclude otherwise.

Plaintiff in her brief raises multiple contentions. She addresses what she refers to as more or less the hostility of the Administrative Law Judge to fibromyalgia cases. And I understand the argument, especially from our oral presentation, to mean that she has a pattern according to the plaintiff of requiring objective evidence in fibromyalgia cases in contravention of governing case law and Social Security rulings.

The second contention is that the ALJ failed to properly assess Dr. Dura's opinion as a treating source, and the focus of that, of course, is on the ability to remain on task and absenteeism.

The third is the failure to explain the weight given to Nurse Practitioner Kirchner's opinion and if parts were rejected.

And the fourth contention is the failure to consider the evidence of the plaintiff being off task and absent and characterizes the opinions of Dr. Dura and Nurse

Practitioner Kirchner as uncontradicted.

The fifth is the improper reliance on Dr. Jenouri's opinion.

And the sixth is that the errors affect the residual functional capacity finding; therefore, the hypothetical presented to the vocational expert, and therefore the step-five determination, is defective.

A couple of things for context. My remand in June of 2017 was based on, one, the failure to consider altogether Nurse Practitioner Kirchner's opinion and explain the parts rejected and the basis and, two, failure to consider Dr. Dura's opinion and the need to evaluate and go through the factors governing and informing the treating source analysis. The Appeals Council's remand in May of 2019 was premised upon the alleged failure to evaluate Dr. Dura's opinion, which is the opinion from June 29, 2015, that appears at 20F, and the argument that the residual functional capacity was not supported because there was no specific weight given to any opinion regarding specific functional limitations.

Starting first with fibromyalgia in general. First, although plaintiff's counsel indicated that he was not raising per se a bias argument to the extent it is considered as deemed to have been raised, there's no question that a claimant is entitled to an unbiased, impartial Administrative

Law Judge. There is, however, a presumption of fairness.

In this case there is no proof of actual bias on the part of ALJ Koennecke against fibromyalgia or its claimants. In any event, any argument of bias is waived since it was not presented to the Agency at the earliest opportunity. 20 CFR Sections 404.940 and 416.1440; *Schneider versus Berryhill*, 2018 WL 3840824 (M.D. Pa. August 13, 2018); *Woodward versus Commissioner of Social Security*, 2017 WL 1190951 (E.D. Mich. March 31, 2017); and *Morris versus Colvin*, 2015 WL 3466109 (N.D. Fla. June 1, 2015).

The argument that I really believe is being raised is the focus on the lack of -- the alleged focus by the Administrative Law Judge on the lack of objective evidence. Fibromyalgia is the subject of Social Security Ruling 12-2p, and it is also the subject of the Second Circuit's decision in *Green-Younger versus Barnhart*, 335 F.3d 99 (2d Cir. 2003). Both make it clear that fibromyalgia is by definition and by its very nature an elusive impairment that doesn't always present itself with objective evidence. There are ways to diagnosis it, as specified in Social Security Ruling 12-2p, but there is a distinction, and it's not even a subtle distinction, between requiring objective evidence to support the diagnosis versus objective evidence to gauge the resulting limitations.

The distinction is noted in SSR 12-2p. In that

ruling the Agency has noted, quote, "As with any claim for disability benefits, before we find that a person with an MDI of FM is disabled, we must ensure there is sufficient objective evidence to support a finding that the person's impairment(s) so limits the person's functional abilities that it precludes him or her from performing any substantial gainful activity."

Administrative Law Judge Koennecke recognized this distinction. In her decision at the bottom of page 1153 and the top of 1154, she noted the following: "I am aware fibromyalgia is a diagnosis rendered without any objective evidence. It is a subjective condition and this claimant, just as every other claimant who alleges this impairment, subjectively reports disabling pain with disabling functional limitations. However, the Agency has not directed that the diagnosis alone equals a finding of disability, rather it is up to the undersigned to determine how severe her fibromyalgia is. Because it is a condition that results in complaints of widespread pain affecting function (in this case testimony that she has excruciating pain throughout her body every day), it necessarily affects findings reported on examination, such as reduced strength due to pain, reduced range of motion due to pain, limited movement due to pain, antalgic gait, muscle bulk versus muscle wasting. Therefore, there is objective evidence that can inform the undersigned

and fulfill the requirement to determine the severity of her fibromyalgia. This is consistent with the Agency's directives for evaluating fibromyalgia. Otherwise, if I am precluded from evaluating any objective evidence, the diagnosis alone does equate to a finding of disability. The objective evidence detained herein" -- I think that might be a typographical error -- "detained herein does not support such a finding in this case. Gait issues, and muscle wasting and other findings are not present from the record."

The distinction that we're discussing here has been recognized by other courts, by the First Circuit in the context of other types of cases, and in that case ERISA, a claim for long-term disability benefits in *Boardman versus the Prudential Insurance Company America*, 337 F.3d 9, n. 5 (1st Cir. 2003). And the distinction is also noted by the Seventh Circuit in *Williams versus Aetna Life Insurance Company*, another ERISA case based on application for long-term disability benefits, 509 F.3d 317 at 322 (7th Cir. 2007).

In my view, the Administrative Law Judge properly considered the available objective evidence to evaluate the effect of plaintiff's fibromyalgia on her ability to perform such functions as walking, bending, reaching, lifting. The Administrative Law Judge considered, as Commissioner's counsel argued, plaintiff's extensive walking activities, tax

preparation, missionary trip to Poland, the fact that she went to college full time and worked part time at the same time, her extensive activities of daily living, and properly drew inferences from those objective factors to come up with the residual functional capacity finding.

She also, of course, properly relied on the opinion, the medical source opinion of consultative examiner Dr. Jenouri, who noted mild restrictions in lifting, that's at 377, something that is totally consistent with light work. *Randy L.B.*, 2019 WL 2210596 (N.D.N.Y. May 22, 2019). So I find no error in the evaluation of objective evidence to determine the extent of plaintiff's limitations notwithstanding her fibromyalgia diagnosis.

The next argument concerns the opinion of Dr. Paul Dura, who is a treating source. Dr. Dura indicated or gave the response to a questionnaire on June 29, 2015, that appears at 735 to 736 of the Administrative Transcript, finding that plaintiff would be off task more than 15 percent but less than 20 percent, she would be absent two days per month, she can sit approximately six hours out of an eight-hour day with breaks. The treating source also gave another opinion on February 15, 2018, that's at page 1101 to 1104, indicating that plaintiff's condition was about the same and the limitations were about the same as previously noted. In that medical source statement, he stated, "I last

personally evaluated the patient on February 19, 2016, so certainly I don't remember her well. She did not keep a scheduled follow-up visit with me on October 25, 2017; however, she was evaluated by the physician's assistant in our office on October 26, 2017. Based on my review of that office note, it would seem to me that her condition is about the same with the same limitations."

The Administrative Law Judge discussed Dr. Dura's opinions on page 1156 and gave them little weight. My decision and a remand was based on a total failure to address Dr. Dura's opinions. Dr. Dura clearly qualifies as a treating source. This matter is governed by the former regulations since the applications were made prior to March of 2017. Under those regulations ordinarily the opinion of a treating physician regarding the nature and severity of an impairment is entitled to considerable deference, provided it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence. *Veino v. Barnhart*, 312 F.3d 578, 588 (2d Cir. 2002). Such opinions are not controlling, however, if they are contrary to other substantial evidence in the record, including the opinions of other medical experts. And, of course, where there are conflicts in the form of contradictory medical evidence, the resolution of such conflicts is properly entrusted to the Commissioner under

Veino.

The treating source rule also provides that when controlling weight is not given to a treating source's opinions, the ALJ must apply several factors, so-called *Burgess* factors, and give an indication of what weight, if any, is given to the opinion and why.

Of course, in *Estrella versus Berryhill*, 925 F.3d 90 (2d Cir. 2019), the Second Circuit realistically noted that very few of the Administrative Law Judge's decisions go through a rote analysis of the *Burgess* factors and found that that is not reversible error if a searching review of the record convinces the Court that the treating source rule was followed.

In this case, although I would have liked a more fulsome discussion perhaps of Dr. Dura's opinions, I believe that the Administrative Law Judge did explain the reasons for giving little weight to Dr. Dura's opinions. One of the reasons cited was that Dr. Dura stated the limitations existed dating back to October 2010. During a significant part of that period she was working. Dr. Dura also failed to respond to a request for clarification on his report of reflex sympathetic dystrophy and complex regional pain syndrome, and the fact that plaintiff herself admitted she did not see Dr. Dura very often.

I think that based on the discussion, the treating

source rule was not abrogated. And I note that the fact that the plaintiff worked during the period of time when Dr. Dura said she was disabled is a relevant factor. *Johnston versus Berryhill*, 2017 WL 1738037 (Dist. Kan. May 4, 2017). So I find no violation of the treatment source rule and the consideration of Dr. Dura's opinion.

When it comes to the opinions of Nurse Practitioner Kirchner, she issued opinions on March 13, 2014, at 443 to 444; and October 21, 2017, 1042 to 1044. They're extremely restrictive but they appear to be based on plaintiff's subjective statements, both containing the caveat as follows, "Patient has history of fibromyalgia. This is managed by Regional Rheumatology, Dr. Dura. The information provided is based on what patient states she can do." And the similar caveat -- that's at page 444. A similar caveat appears at page 1044.

It's certainly a proper basis for giving less weight to the opinion of Nurse Practitioner Kirchner. Of course, under the former regulations she's not an acceptable medical source. Her opinions are discussed by the Administrative Law Judge at 1155 to 1156 and given no weight. There is no indication here that the opinions are based on the nurse practitioner's own medical judgment; it's clear that she defers to Dr. Dura who was treating her fibromyalgia, so they have little or no value and were

properly discounted.

I do acknowledge that in my instructions I wanted a fuller explanation of Nurse Practitioner Kirchner's opinion and why it was being discounted. I think it's in there. I note that that instruction is not included in the Appeal Council's second remand order. So it's addressed, maybe not perfectly, but I cannot say that a reasonable factfinder would have to afford more weight to Nurse Practitioner Kirchner's opinions, so I find no error.

In terms of off task and absenteeism, that, of course, brings into play the residual functional capacity of the plaintiff, which is pivotal to the finding of no disability. A claimant's RFC represents a finding that the range of tasks she is capable of performing notwithstanding her impairment ordinarily represents a maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day for five days a week, or an equivalent schedule. *Tankisi versus Commissioner of Social Security*, 521 Fed App'x 29, at 33 (2d Cir. 2013). An RFC determination, of course, is informed by consideration of all of the relevant medical and other evidence.

In this case, Dr. Dura, as I stated earlier, opined that the plaintiff would be off task 15 to 33 percent of the time, at page 735, 736, and absent two days per month, and

that she would have good and bad days. On February 15, 2018, he opined she would be off task 15 to 20 percent and absent two times per month, at 1101 to 1103, and had good and bad days. Nurse Practitioner Kirchner stated the need to take frequent unscheduled breaks, at 444. Dr. Jenouri did not mention any limitation regarding schedule or absenteeism.

I note that an RFC determination need only be based on substantial credible medical evidence. The Administrative Law Judge properly gave more weight to Dr. Dura's opinions and no weight to Nurse Practitioner Kirchner, which leaves, one could argue, a void. But the cases are clear that there is no need for a medical opinion supporting of every limitation in an RFC determination. That was noted by the Second Circuit in *Tankisi*, a case that I cited a moment ago, as well as *Monroe v. Commissioner of Social Security*, 676 Fed. Appx. 5 (2d Cir. 2013), and *Moxham versus Commissioner of Social Security*, 2018 WL 1175210 (N.D.N.Y. March 5, 2018).

I note, of course, as a backdrop that it is plaintiff's burden to show her limitations up through step four, and that includes the RFC finding. I think this may be considered a close case, but in this instance the Administrative Law Judge in rejecting absenteeism and off task relied on the activities of daily living, including part-time and full-time employment, inconsistencies between plaintiff's claims and treatment records. It is clear that

she was able to attend college four days per week, taking four courses, and working part time. There is no indication that that was impeded by excessive absenteeism or being off task.

Given the deferential standard that I'm applying, I am unable to say that the residual functional capacity determination was not supported by substantial evidence. So in conclusion, I find no error in formulating the residual functional capacity. Substantial evidence supports it in its entirety. At step five the Commissioner carried her burden based on the vocational expert's testimony and presented with the hypothetical that was based on the residual functional capacity finding.

So I will grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint.

Thank you both. Enjoy the rest of your summer.

* * *

C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Eileen McDonough

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter